IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-499

BOARD OF SUPERVISORS OF HINDS COUNTY, MISSISSIPPI, ET AL.,
Petitioners,

v.

HENRY J. KIRKSEY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (Pet. App. A) is reported at 402 F. Supp. 658. The panel opinion of the Court of Appeals for the Fifth Circuit (Pet. App. B) is reported at 528 F.2d 536. The opinion of the Court of Appeals for the Fifth Circuit sitting *en banc* (Pet. App. C) reversing the panel and the District Court is reported at 554 F.2d 139.

JURISDICTION

Petitioners allege the jurisdictional prerequisites they believe grant this Court jurisdiction in the *Jurisdiction* section of their Petition (p. 2). The opinion and judgment of the Fifth Circuit sitting *en banc* was rendered on May 31, 1977. Thus the deadline for filing the Petition pursuant to 28 U.S.C. §2101(c) was August 29, 1977. The Petition was not filed until September 30, 1977. Petitioners believe that their petition for rehearing *en banc* of the *en banc* judgment below operated to extend their time to petition for certiorari. Respondents contend, *infra*, that Rules 35 and 40, F.R. App. P., do not authorize the filing of petitions for rehearing or rehearing *en banc* from *en banc* decisions of Courts of Appeals, that petitioners may not unilaterally extend the time for filing their Petition for Certiorari by filing a petition for rehearing or rehearing *en banc* from an *en banc* decision of the Court of Appeals, and that therefore the Petition was untimely filed. This Court is therefore without jurisdiction.

QUESTION PRESENTED

Whether a District Court-ordered county redistricting plan, which creates five oddly shaped supervisors' districts that span the county in long corridors and reach into the City of Jackson to fragment and disperse the heaviest black population concentration in the county among all five districts, and which—in a county which is 39% black—deprives blacks of a voting majority in any of the five districts, constitutes an abuse of the District Court's equitable remedial discretion, or is unconstitutional, because it perpetuates the intentional and purposeful discriminatory denial to black voters of equal access to the political process?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The applicable provisions of the Fourteenth and Fifteenth Amendments to the United States Constitution are set out in the Petition at pp. 4-5. The statutes involved are 42 U.S.C. §§ 1971(a)(1), 1973, and 1983.

42 U.S.C. § 1971(a)(1) provides as follows:

> All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, provides as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

This case involves the District Court-ordered redistricting of the five supervisors' districts (beats) of Hinds County, Mississippi. These are the same supervisors' districts which this Court cited as an example of what District Courts should avoid in court-ordered legislative redistricting plans in the Mississippi legislative reapportionment case decided last Term, *Connor* v. *Finch*, Nos. 76-777, 76-933, 76-934, and 76-935, decided May 31, 1977 (slip op. at 15-17).

Respondents are six black registered voters of Hinds County who represent the class of black registered voters of Hinds County and who filed this action on July 27, 1971 seeking a constitutional and equitable county redistricting plan for Hinds County. The United States Department of Justice also entered an appearance in the Court of Appeals supporting plaintiffs' contentions and urging reversal of the District Court's decision.

Under Mississippi law, each county is divided into five supervisors' districts, or "beats," which serve as election districts for members of the county board of supervisors —the county governing board—justices of the peace, constables, and members of the county board of education. Although Hinds County is 39% black (1970 Census), all the elected county officials are white, and despite many attempts no black person has ever been elected a member of the county Board of Supervisors, Justice of Peace (now called Justice Court Judges), Constable, or member of the county Board of Education.

Prior to the first court-ordered county redistricting in 1969, two of the five supervisors' districts of Hinds County had black majorities of 76.26% (District 2) and 67.92% (District 3) (Pet. App. A, p. A16). After passage of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*, permitting Hinds County blacks to register and

vote for the first time in large numbers,[1] and after the first black candidates attempted to qualify to run for county office, the Board of Supervisors devised a new county redistricting plan and the District Court for the Southern District of Mississippi (per Harold Cox, J.) approved the plan and ordered it into effect in a lawsuit filed by a white plaintiff.[2] That plan created five oddly shaped districts which extended from the far corners of the county in long corridors that fragmented the heavy black population concentration in the City of Jackson. Under the 1969 court-ordered redistricting plan, all five districts were majority white (Pet. App. A, p. A17), thus reducing the number of majority-black districts from two to zero. All black candidates who ran for county office under that plan in the 1971 county elections were defeated.

In 1971, prior to the county primary and general elections, respondents filed this action as a class action alleging that the 1969 county redistricting plan unconstitutionally minimized and cancelled out black voting strength, unconstitutionally failed to provide equality of population among the districts, and was unenforceable because of an objection to the plan lodged by the United States Attorney General pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.[3]

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[1] Prior to passage of the Voting Rights Act, 92.1% of the voting age whites were registered to vote, but only 15.5% of the voting age blacks were registered. *Hearings on the Voting Rights Act of 1965 (S. 1564) Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 2, at 1254 (1965).

[2] *Smith* v. *McGee*, Civil No. 4483 (S.D. Miss., Order of Dec. 19, 1969) (Ex. P-12).

[3] In his objection letter, the Attorney General found that

> "the district boundary lines are located within the City of Jackson in a manner that suggests a dilution of black voting strength will result from combining a number of black persons with a larger number of white persons in each of the five

After submission of stipulated statistics based on 1970 Census data showing a total deviation from population equality of 41.46% among the 1969 districts, the District Court in 1972 held the 1969 plan unconstitutional for malapportionment and ordered the Board of Supervisors to submit a new equally apportioned redistricting plan. Instead of drafting a new plan, the Board of Supervisors simply revised the boundaries of four of the five districts of the 1969 plan in five places in the City of Jackson and in 1973 submitted the revised 1969 plan to the District Court. The District Court in 1975 after trial adopted the Board's new plan and ordered it into effect (Pet. App. A, pp. A1-A38).

1970 Census statistics show that 69% of the total black population of Hinds County reside in 48 contiguous, majority black Census enumeration districts in the central portion of the City of Jackson (Pet. App. A, p. A6) in an area shaped like a boot.[4] Of the 63,267 persons living in these 48 enumeration districts, 92% are black. The court-ordered redistricting plan is an "apple pie" plan in which each of the five districts span the county in long,

districts. * * * Moreover, our discussions with [Board attorneys and the draftsman] have revealed that such district lines within the City of Jackson were not based on any compelling governmental need and appear to be located fortuitously without any compelling governmental justification for their location. Our analysis persuades me that the specific location of the lines is not related to numeric population configurations or considerations for district compactness or regularity of shape." (Complaint, Appendix VI.)

Defendants took the position that since the plan had been approved by the District Court in prior litigation, the objection had no legal effect. When the Justice Department filed suit to enforce the objection, plaintiffs voluntarily dismissed the § 5 count of their complaint. The Justice Department lawsuit subsequently was held moot when the plan was struck down for malapportionment in this case.

[4] A map showing the location of this heavy black population concentration (shaded area) and the boundaries of the five districts under the court-ordered redistricting plan is attached to this Brief.

narrow corridors going east and west, slice into this heavy black population concentration in the City of Jackson, and fragment and disperse the black population among all five districts. The District Court agreed with plaintiffs that District 3 resembles a turkey and District 4 looks like a baby elephant (Pet. App. A, p. A13). Three of the new districts have substantial white population majorities, and two have slight black population majorities of 53.4% (District 2) and 54.0% (District 5) (Pet. App. A, p. A17). However, a majority of the voting age population in each of the five districts is white (Pet. App. A, p. A19).[5]

At the trial of this case both of plaintiffs' expert witnesses testified that it was unlikely if not impossible that black voters could ever elect candidates of their choice in any of the proposed districts, and this testimony was not contradicted by any other witness (Pet. App. C, p. A74). Defendants' only witness, the planner who drew the plan for the Board, asserted in justification for the irregular shapes of the districts that the 1969 plan had equalized county-maintained road mileage and bridges to equalize the road and bridge maintenance responsibilities of the supervisors among the five districts, that the supervisors were satisfied with this arrangement and so informed the draftsman of the plan, and that he sought to preserve this feature in the new plan as far as possible (Pet. App. C, p. A77). However, defendants' answers to plaintiffs' interrogatories showed that the proposed plan did not equalize county-maintained road mileage and bridges among the districts (Ex. P-26), and the deposition testimony of the President of the Board of Supervisors indicated that equalization of county-maintained roads and bridges had not been

[5] Because of a heavy out-migration of adult blacks from Hinds County, the percentage of blacks in the voting age population is disproportionately less than their percentage in the total population. (Pet. App. A, p. A18).

a factor in county redistricting prior to the 1969 plan, that prior inequalities of road and bridge maintenance responsibilities had not caused any difficulties in county administration, and that equalization of such factors was not necessary to efficient county government (Ex. P-25, pp. 5, 6-7, 17-18, 20-21).

After the Board had filed its new plan with the District Court, plaintiffs filed timely objections to that plan and filed an alternative redistricting plan of their own, based exclusively on Census tracts, which provided two majority-black districts which were 66.47% and 68.36% black in population within a total deviation of 3.87%. Plaintiffs' alternative plan was rejected by the District Court (Pet. App. A, p. A35).

In the 1975 county elections, all black candidates for county office were defeated. On February 24, 1976, a panel of the Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court (Pet. App. B, pp. A39-A53). Plaintiffs' petition for rehearing *en banc* was granted, and on May 31, 1977 the Court of Appeals for the Fifth Circuit sitting *en banc* in an opinion by Judge John C. Godbold by a vote of 10 to 3 reversed the panel decision, reversed the judgment of the District Court, and remanded the case back to the District Court for the fashioning of a remedy (Pet. App. C, pp. A54-A104).

Applying well-established principles developed in cases alleging dilution of black voting strength in this Court and in the Fifth Circuit, the *en banc* court held that for plaintiffs to prove unconstitutional dilution it was not enough to show merely that blacks had not been elected in proportion to their numbers (Pet. App. C, p. A60). Rather, plaintiffs had the burden of proving that Hinds County blacks had less opportunity than did whites to participate in the political processes and to elect officials of their choice (*id.*, pp. A59-61).

Relying on the District Court's discussion of the extensive evidence of racial discrimination against blacks in Hinds County (*id.*, pp. A62, A80-A83) and the District Court's finding that Hinds County blacks had been subjected to racial discrimination in voting and other areas (Pet. App. A, p. A24), the Court of Appeals found that plaintiffs had demonstrated a long history of purposeful and intentional denial to blacks of equal access to the political process in Hinds County. The redistricting plan at issue here—by fragmenting a heavy black concentration in the context of racial bloc voting (*id.*, p. A73) and by denying blacks a voting age population majority in any district (*id.*, pp. A56, A74)—perpetuated that denial of equal access:

> "Plaintiffs proved a long history of denial of access to the democratic process. That history of official action is one of purposeful and intentional discrimination. The structure and the residual effects of the past have not been removed and replaced by current access. The supervisors' reapportionment plan, though racially neutral, will perpetuate the denial of access. By fragmenting a geographically concentrated but substantial black minority in a community where bloc voting has been a way of political life the plan will cancel or minimize the voting strength of the black minority and will tend to submerge the interests of the black community. The plan denies rights protected under the Fourteenth and Fifteenth Amendments." (*Id.*, pp. A78-A79.)

Under the circumstances of this case, the Court of Appeals found that the District Court gave too much weight to the "administrative convenience" of equal road and bridge responsibilities at the expense of the constitutional rights of the plaintiffs to equal opportunities for participation in the democratic process:

> "Also, in approving the supervisors' plan the district court overemphasized factors that must be subor-

dinated to the constitutional interests at stake. * * * There was simply too much emphasis on the administrative convenience of equal road and bridge responsibility at the expense of effective black minority participation in democracy [footnote omitted]. Factors such as these may be considered in redistricting but they are not talismanic. 'It is clear, however, that the mere fact that an apportionment plan may satisfy some legitimate governmental goals does not automatically immunize it from constitutional attack on the ground that it has offended more fundamental criteria.' *Robinson* v. *Commissioners Court*, 505 F.2d 674 at 680 (CA 5, 1974). Less fundamental concerns must be subordinated to the constitutional interests of the citizenry. *Avery* v. *Midland County*, *supra*, 390 U.S. at 484, 20 L.Ed. 2d at 53; *Turner* v. *McKeithen*, 490 F.2d 191, 196 n.23 (CA 5, 1973); cf. *Taylor* v. *Monroe County Board of Supervisors*, 394 F.2d 333 (CA 5, 1968)." (*Id.*, pp. A77-A78.)

Alternatively to holding the court-ordered plan unconstitutional, the Court of Appeals also held that the plan was inequitable as a court-ordered remedy for the malapportioned districts of the 1969 plan. Following the prior decisions of this Court holding court-ordered redistricting plans to higher standards than legislative plans, the court below held that the remedy ordered by the District Court here was "an abuse of its equitable remedial discretion" (*id.*, p. A79).

> "Multimember districts are objectionable because they tend to minimize or cancel the voting power of minorities. Slicing up a cohesive minority voting area in a community where there is bloc voting has the same tendency to exacerbate rather than remedy denial of access to the political process. Thus, as a matter of its remedy-fashioning power, the court could not approve a plan which tended to carry forward into the future the long-lived denial of black access to the political process." (*Id.*, pp. A79-A80.)

ARGUMENT

Introduction and Summary

The Petition in this case was filed 122 days after the judgment of the Court of Appeals was entered, or 32 days after the deadline provided by 28 U.S.C. § 2101 (c) had passed. Petitioners' effort to buy more time and further delay the final outcome of this prolonged litigation by filing a petition for rehearing *en banc* from the *en banc* decision of the Fifth Circuit should not operate to toll § 2101(c)'s ninety-day limitation for filing a petition for certiorari. Petitioners' petition for rehearing *en banc* was completely out of order and not authorized by the Federal Rules of Appellate Procedure or the Local Rules of the Fifth Circuit, and under the specific provisions of Rule 35(c), F.R. App. P., did not suspend the finality of the Court of Appeals' judgment.

But even if the Petition is deemed to have been timely filed, this case is not worthy of review by certiorari in this Court. This Court has already seen the supervisors' district lines at issue here in *Connor* v. *Finch*, Nos. 76-777, 76-933, 76-934, 76-935, decided May 31, 1977, and cited them as an example of what District Courts should avoid in court-ordered legislative redistricting plans (slip op. 15-17). Fragmentation of a heavy concentration of minority voting strength in oddly shaped districts to dilute black voting strength without adequate justification is equally impermissible in a court-ordered county redistricting plan.

Ten judges of the Court of Appeals carefully reviewed the facts of this case and the applicable legal principles and concluded that the challenged plan was both unconstitutional and inappropriate as a court-ordered plan. Even the Circuit Judge who initially wrote the panel opinion affirming the judgment of the District Court

(Gee, J.) (Pet. App. B, p. A39) concluded upon reconsideration that the panel opinion was wrong and concurred in the *en banc* decision reversing his decision for the panel (Pet. App. C, pp. A83-A90).

Petitioners concede that the Court of Appeals applied the correct legal standard in holding that in the absence of a racially motivated gerrymander, a court-ordered redistricting plan is constitutionally impermissible if it perpetuates an existent denial of access by a racial minority to the political process (Pet., p. 25). They base their argument for certiorari on what the Court of Appeals did not say about a remedy, completely misconstrue what the Court of Appeals said about the burden of proof, and make the novel contention that the Fifth Circuit's *en banc* decision conflicts with other panel decisions of the Fifth Circuit[6] and may not conflict with, but "misapprehends the applicability" (Pet., p. 17) and "is an erroneous extension of" (Pet., p. 37) decisions of this Court. In fact, all of the cases from this Court upon which petitioners rely were cited in the Fifth Circuit's opinion and fully considered by the ten judges of the majority in reaching their decision.

No amount of picking and straining at what the Fifth Circuit said or did not say can detract from this fundamental and preeminent fact: the county redistricting plan at issue here is a racially discriminatory plan which guts the voting strength of the newly-enfranchised black voters of Hinds County and, in the face of undisputed evidence of an extensive past history of racial discrimination and exclusion from the political process, effectively deprives them of the opportunity to elect officials of their

[6] The resolution of conflicts of decisions within a circuit is not one of the considerations established by this Court governing review on certiorari. Sup. Ct. Rule 19. Resolution of such conflicts is one of the purposes of *en banc* rehearing by the Court of Appeals. Rule 35(a), F.R. App. P.

choice in any district. No important Federal question is presented which this Court has not already passed upon in other cases, and the decision here is fully consistent—and there is no conflict—with the prior decisions of this Court in other cases.

I. THE PETITION SHOULD BE DENIED BECAUSE IT WAS UNTIMELY FILED.

The judgment of the Court of Appeals was entered on May 31, 1977, the date the *en banc* decision of the Court of Appeals was rendered (Pet. App. C, p. A54; Pet. App. D, p. A106). Under 28 U.S.C. § 2101(c), petitioners had ninety days from the entry of such judgment to file their petition for a writ of certiorari, or until August 29, 1977. Petitioners in fact did not file their petition for a writ of certiorari until September 30, 1977, thirty-two days after the § 2101(c) deadline had passed. No application for an extension of time within which to file was sought or granted. Since the time for filing a petition in a civil action is statutory, and is not prescribed by Rule of this Court, the Petition "must . . . be denied for want of jurisdiction." *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).

Petitioners contend that the time for filing their Petition was extended when, after the *en banc* decision of the Fifth Circuit was announced and its judgment entered, petitioners filed a document with the Fifth Circuit styled "Petition for Rehearing En Banc on Behalf of Defendants-Appellees" (Pet., p. 2). In other words, defendants contend that they could—to obtain more time and to delay further the final outcome of this prolonged litigation—unilaterally extend the time for filing their certiorari petition by filing a petition for rehearing *en banc* from the *en banc* decision of the Fifth Circuit.

This contention must fail. Normally the filing of a proper and timely petition for rehearing does toll the

running of the time within which to petition for certiorari. The rationale for this doctrine is that the petition for rehearing operates to suspend the finality of the lower court's judgment pending the court's further determination whether the judgment should be modified, *Department of Banking* v. *Pink*, *supra*, 317 U.S. at 266. But this general principle is not applicable here for several reasons. First, neither the Federal Rules of Appellate Procedure nor the Local Rules of the Court of Appeals for the Fifth Circuit allow the filing of a petition for rehearing *en banc* from an *en banc* judgment of the court.[7] Once the Court of Appeals granted plaintiffs' petition for rehearing *en banc* in 1976 and reheard the case *en banc*, its *en banc* deliberations were final and the defendants (petitioners here) had been accorded the benefit of an *en banc* rehearing of the case. Thus, defendants' post-*en banc* decision to petition for rehearing *en banc* was in the nature of a second petition for rehearing which is not authorized by the Federal Rules of Appellate Procedure nor the Local Rules of the Fifth Circuit. *F.H.E. Oil Co.* v. *Commissioner*, 150 F.2d 857 (5th Cir. 1954); *Sun Oil Co.* v. *Burford*, 130 F.2d 10 (5th Cir. 1942), *rev'd on other grounds*, 319 U.S. 315 (1943).

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[7] Although the Clerk of the Fifth Circuit filed petitioners' alias petition for rehearing *en banc* and although the Court of Appeals entered an order denying the petition, petitioners cannot contend that their petition was received and considered on its merits. Since the *en banc* court gave no reason for denying petitioners' petition, the court might well have denied the petition for the wholly procedural reasons that it was unauthorized by the Rules and that the court was without jurisdiction to consider a petition for rehearing *en banc* from an *en banc* decision of the court. But even if the Court had discretion to entertain the petition, it certainly was not bound to. At best, therefore, petitioners' decision to file the unauthorized rehearing petition was at their own risk; their decision bought them no additional time under the applicable rules and statutes.

Second, Rule 35(c), F.R. App. P., governing suggestions for rehearing *en banc* specifically provides: "The pendency of such a suggestion [for rehearing *en banc*] whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate." Thus, under the specific provisions of Rule 35(c), petitioners' petition for rehearing *en banc* did not operate to suspend the finality of the lower court's judgment and therefore did not toll the time within which petitioners were required to file their Petition for Writ of Certiorari.

The burden is on petitioners to establish that their Petition for Writ of Certiorari was timely filed and that this Court has jurisdiction to consider it. This they have failed to do.

II. THE DECISION BELOW IS CLEARLY CORRECT.

The court-ordered redistricting plan at issue here is a classic example of what this Court warned District Courts to avoid in court-ordered state legislative redistricting in *Connor* v. *Finch*, Nos. 76-777, 76-933, 76-934, 76-935, decided May 31, 1977 (slip op. pp. 15-17)—odd-shaped districts which fragment a heavy black population concentration and minimize and cancel out the voting strength of a racial minority group. Indeed, these are the very districts cited by this Court in *Connor* as an example of what Districts Courts should avoid. When minority group concentrations are sliced up like a piece of apple pie and spread out among several districts, newly-enfranchised voters can be effectively deprived of the opportunity to elect any officials of their choice. For this reason, redistricting plans which fragment and disperse a minority group concentration and dilute minority voting strength in the face of a prior history of discrimination and without adequate justification have been struck down by the courts, and such fragmentation has

been condemned by commentators as a racial gerrymandering technique. *Cf. Taylor* v. *McKeithen*, 407 U.S. 191 (1972); *Robinson* v. *Commissioners Court*, 505 F.2d 674 (5th Cir. 1974); *Moore* v. *Leflore County Bd. of Election Comm'rs*, 361 F.Supp. 603 (N.D. Miss. 1972), *aff'd*, 502 F.2d 621 (5th Cir. 1974); *Klahr* v. *Williams*, 339 F. Supp. 922 (D. Ariz. 1972) (three-judge court); Clinton, *Further Explorations in the Political Thicket*, 59 IOWA L. REV. 1, 4 (1973); Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 MISS. L.J. 391, 402ff. (1973).

III. THERE IS NO CONFLICT OF DECISION.

The petition for writ of certiorari misconstrues and distorts the decision of the Court of Appeals in several significant respects to attempt to create issues which are not in fact present in this case.

First, petitioners argue with what the Court of Appeals did not say. Petitioners contend that—although the Fifth Circuit did not say so—the "indirect, yet unmistakable, direction" (Pet., p. 17) of the Court of Appeals is that on remand the District Court should fashion a racial gerrymander to insure Hinds County blacks proportional representation on the Board of Supervisors (*id.*). In fact, given its extensive discussion of the offensive aspects of the court-ordered plan in this case, the Fifth Circuit majority plainly considered it unnecessary to give any specific directions to the District Court on the fashioning of a new remedy. Certainly it is clear that the Court of Appeals did not intend to imply what petitioners attribute to it, since the lower court's decision rejects outright the notion that Hinds County blacks are constitutionally entitled to proportional representation (Pet. App. C, p. A60) and eschews any such "simplistic" or "mechanical" solutions (*id.*, p. A80). Since no such directions on the fashioning of a remedy were

given, there is no conflict with the decision of this Court in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and the opinion below does not "misapprehend the applicability of" (Pet., p. 22) *United Jewish Organizations of Williamsburg, Inc.* v. *Carey*, 430 U.S. 144 (1977).

Second, petitioners completely misconstrue what the Court of Appeals did say about who has the burden of proof on whether Hinds County blacks have been denied equal access to the political process (Pet., pp. 24-27). Following this Court's decisions in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and *White* v. *Regester*, 412 U.S. 755 (1973), the Fifth Circuit held that in the absence of a racially motivated gerrymander, a redistricting scheme which perpetuates a past denial to blacks of equal access to the political process offends constitutional guarantees. Petitioners admit that this is the correct legal standard (Pet., p. 25). In accordance with the above-cited decisions, the Fifth Circuit held that it was not enough for plaintiffs merely to show a disparity between the percentage of blacks in the population and the number of black elected officials (Pet. App. C, p. A60). Rather, the Fifth Circuit held in clear and unmistakable language that the plaintiffs had the burden of producing evidence to support findings that Hinds County blacks "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice" (*id.*, p. 59A, *quoting from White* v. *Regester*, *supra*, 412 U.S. at 766).

Weighing the undisputed facts of this case in accordance with the standards developed by this Court, the Fifth Circuit correctly determined that "the plaintiffs established a long-existent history of sweeping and pervasive denial of access to the democratic political process and of official unresponsiveness to the needs of blacks" (*id.*, p. A67).

Thus, contrary to petitioners' argument, the Fifth Circuit did not hold that the initial burden of proof fell

upon defendants to prove present equality of access for blacks to the political process, but rather held that the initial burden fell upon the plaintiffs to prove inequality of access. What the Fifth Circuit did hold was that once plaintiffs had met their burden,

> "it then fell to the defendants to come forward with evidence that enough of the incidents of the past had been removed, and the effects of past denial dissipated, that there was presently equality of access [footnote omitted]." (Pet. App. C, p. A64.)

The notion that once plaintiffs have proven that black voters have been and are denied equal access to the political process, the burden shifts to defendants to refute such evidence is nothing new and certainly cannot be characterized as contrary to any decisions of this Court or such a departure from the accepted and usual course of judicial proceedings as to require review by this Court. Indeed, the Fifth Circuit's approach is wholly consistent with that adopted by this Court in similar contexts. *Mt. Healthy School Dist. Bd. of Education* v. *Doyle*, 429 U.S. 274, 287 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270-71, n.21 (1977).

On the question of proving unequal access to the political process, petitioners argue that it was improper for the lower court to infer that inequality of access derives from—among other factors—economic and educational inequalities (Pet., pp. 28-29).[8] But this inference, so strongly attacked by petitioners, is nothing new and comes straight out of *White* v. *Regester*, *supra*, 412 U.S. at 768-70. In *White*, in support of its conclusion that Mexican-Americans had been and were being denied equal access to the political process in Bexar County,

[8] Petitioners also contend that this inference was then used as a "springboard" for further inferences (Pet., p. 29), but fail to specify what further inferences were drawn.

Texas, this Court cited findings by the District Court that the Mexican-American community had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others" (*id.* at 768).

The principle that low socio-economic status and deprivations in education, income, employment and other areas have a negative impact on opportunities for political participation is not only accepted as a matter of law, but also is firmly established by numerous studies in political science. *See, e.g.*, L. MILBRAIGHT, POLITICAL PARTICIPATION, ch. V (1965); W. Erbe, *Social Involvement and Political Activity: A Replication and Elaboration*, 29 AM. SOCIOLOGICAL REV. 198 (1964); A. CAMPBELL *et al.*, THE AMERICAN VOTER, ch. 17 (1960); A. CAMPBELL, G. GURIN, & W. MILLER, THE VOTER DECIDES 187-99 (1954).

But in this case the notion that inequality of access flows from depressed socio-economic conditions is more than an inference. Dr. James W. Loewen, a political sociologist familiar with the condition of blacks in Hinds County, testified at trial in detail how, because of their disadvantaged socio-economic position, Hinds County blacks are disadvantaged in the political process and have less access (Tr. 244-48). This testimony was not refuted by any of defendants' evidence.

What other inferences could be drawn? Certainly there is nothing in this case to support the inference that because Hinds County blacks have been unlawfully discriminated against for the past 100 years—and because they continue to suffer the political, educational, economic, and employment deprivations of 100 years of discrimination—they have equal or better opportunities than the privileged white majority to participate in the politi-

cal processes and to elect legislators of their choice. Petitioners' contentions here are totally without merit.

Third, petitioners distort the handling by the Court of Appeals of the factual conclusions of the District Court under the "clearly erroneous" standards of Rule 52(a), F.R. Civ. P. (Pet., pp. 30-33). Under Rule 52(a), the appellate court may set aside findings of fact only if they are "clearly erroneous." Petitioners contend that the appellate court failed properly to apply the "clearly erroneous" standard to fact-finding by the District Court. Here petitioners fail to distinguish between "subsidiary facts," involving a determination of an evidentiary or primary fact and to which the clearly erroneous rule applies, and "ultimate facts," which are really factual conclusions often involving mixed fact and law determinations which "may involve the very basis on which judgment of fallible evidence is to be made," *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944), and to which the clearly erroneous standard does not apply, *Baumgartner, supra; cf. East* v. *Romine, Inc.*, 518 F.2d 332, 338-39 (5th Cir. 1975); *Causey* v. *Ford Motor Co.*, 516 F.2d 416, 420-21 (5th Cir. 1975).

Thus, the only example which petitioners cite, the finding by the District Court that its redistricting plan gives black voters a realistic opportunity to elect officials of their choice in Districts 2 and 5, is really an ultimate fact or factual conclusion involving mixed fact-law determinations. The Court of Appeals held that this conclusion "will not stand examination" because the District Court (1) applied an erroneous legal standard by giving improper weight to total population statistics and by neglecting the other measures of access to the political process (Pet. App. C, p. A75); (2) based its conclusion on entirely speculative manipulations of the statistical evidence given by plaintiffs' experts which were "too attenuated" (*id.*); and (3) failed to give consideration to

the prior decisions of this Court holding court-ordered plans to higher standards than legislatively enacted plans (*id.*, pp. A76-A77).

Thus, contrary to petitioners' allegations, the appeals court did not substitute its own fact-finding for the findings of evidentiary facts by the District Court, but rather, accepting the "subsidiary facts" found by the District Court, merely found that the District Court's conclusions from the evidence were improper and erroneous as a matter of law.[9]

Petitioners next contest the principle followed by the Fifth Circuit that a court-ordered reapportionment plan must be held to higher standards than a legislative plan (Pet., pp. 34-37). Although petitioners recognize that this is the law established by this Court in *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976), and *Chapman* v. *Meier*, 420 U.S. 1 (1975),[10] they contend that this rule is applicable only to challenges to multimember and malapportioned districts, and that this Court has never applied the principle to challenges based upon dilution of black voting strength.

Petitioners' contentions are based upon a misreading of these cases and *Connor* v. *Finch*, Nos. 76-777, 76-933,

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[9] Similarly, contrary to petitioners' charge that the appeals court failed to give "any weight" to facts which the District Court properly judicially noticed (Pet., pp. 33-34), the Fifth Circuit found that some, such as the District Court's apathy theory, were not as a matter of law and common sense properly the subject of judicial notice (Pet. App. C, pp. A65-A66), and that others—such as the District Court's conclusion that white elected officials were responsive because they complied with the numerous court orders entered in Hinds County civil rights cases—were not supported by the evidence, were erroneous as a matter of law, showed only that litigation was necessary to remove the discrimination and that the "litigation has worked" (Pet. App. C, p. A66).

[10] *Chapman* establishes that "[a] court-ordered plan must, however, be held to higher standards than a State's own plans." 420 U.S. at 26.

76-934, 76-935, decided May 31, 1977. In *Connor* the Court not only reiterated its prior teachings that court-ordered plans must avoid multi-member districts and achieve population equality with little more than *de minimis* variations, but also—using the Hinds County example—counselled against unjustified dilution of black voting strength in court-ordered plans:

> "Such unexplained departures from the results that might have been expected to flow from the District Court's own neutral guidelines can lead, as they did here, to a charge that the departures are explicable only in terms of a purpose to minimize the voting strength of a minority group. * * * It is . . . imperative for the District Court, in drawing up a new plan, to make every effort not only to comply with established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges [footnote omitted]." Slip op. at 18.

The rationale for avoiding unjustified dilution of black voting strength in court-ordered plans is obvious. As the Court of Appeals noted (Pet. App. C, pp. A79-A80), one of the reasons given by this Court for its preference for single-member districts in court-ordered plans is that multi-member districts frequently tend to minimize or cancel out minority voting strength. *Connor* v. *Finch*, *supra*, slip op. at 8 (single-member districts preferred because multi-member districts "tend to submerge electoral minorities and over-represent electoral majorities"); *Chapman* v. *Meier*, *supra*, 420 U.S. at 16-19. Similar and equally destructive dilution can be accomplished in a court-ordered plan which slices up a cohesive concentration of minority voting strength without adequate justification.[11]

[11] The Court of Appeals did not say, as petitioners contend (Pet., p. 37), that consideration of equalization of county-maintained road mileage and bridges could not be considered in redistricting, but only that these administrative considerations could not take precedence over plaintiffs' constitutional rights (Pet. App. C, pp. A77-A78). See *Avery* v. *Midland County*, 390 U.S. 474, 484 (1968).

Thus, the principles followed by the lower court in holding that the District Court's plan constituted an abuse of discretion not only were not an erroneous extension of the teachings of this Court in *East Carroll Parish* and *Chapman*, but were fully and completely consistent with the principles announced in those cases and in *Connor* v. *Finch*.

Finally, petitioners contentions that the Fifth Circuit's decision "misapprehends the proper application" of and conflicts with *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (Pet., pp. 38-40) cannot withstand scrutiny and overlook the lengthy discussion by the Court of Appeals of these cases. The Fifth Circuit carefully and extensively analyzed the teachings of those cases and applied them to the facts presented here (Pet. App. C, pp. A68-A72). Indeed, the Fifth Circuit's discussion of the issue of official purpose and intent takes up five printed pages as reproduced in the Appendix to the Petition. Not one of the three dissenting judges suggested any conflict between the majority's opinion and *Washington* or *Arlington Heights*.

Assuming that *Washington* and *Arlington Heights* were applicable to this case, the Fifth Circuit found that the undisputed facts showed that the past exclusion of and discrimination against Hinds County black people from equal access to the political process "was purposeful and intentional" and "unexplainable on any grounds other than race" (Pet. App. C, p. A62). Then, after carefully analyzing the criteria of *Washington* and *Arlington Heights*, the Fifth Circuit found that it "is not open to doubt" that this redistricting plan "was the instrumentality for carrying forward patterns of purposeful

and intentional discrimination that already existed in violation of our Constitution" (*id.*, p. A70).

Thus, just as this Court found in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 205 (1973)—a case cited and relied upon in both *Washington* (at 240) and *Arlington Heights* (at 265)—that a constitutional violation would be shown by "a current condition of segregation resulting from intentional state action," so the Fifth Circuit found here that this plan would unconstitutionally perpetuate a current condition of exclusion from the democratic process resulting from intentional state action. *See also, Wright* v. *City of Emporia*, 407 U.S. 451, 460 (1972) (discussed in *Washington* v. *Davis*, at 243.); *Green* v. *County School Board*, 391 U.S. 430, 438 (1968) (freedom of choice plan which perpetuates intentional and purposeful school segregation unacceptable). The Fifth Circuit was careful to distinguish the claims rejected in such cases as *Whitcomb* v. *Chavis*, *supra*, and eschewed any reliance merely on the "effect" of the plan, but rather noted that the plaintiffs in *White* v. *Regester*, *supra*, had been successful "because they established the requisite intent or purpose in the form of the existent denial of access to the political process" (Pet. App. C, p. A72).

Under these circumstances, it is not determinative that defendants' planner denied any racially discriminatory purpose in drawing the plan. *Cf. Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971); *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45-46 (1971). Mere denials of an intent to discriminate in drawing the redistricting plan are insufficient. *Cf. Alexander* v. *Louisiana*, 405 U.S. 625, 632 (1972). Thus, even if the plan were drawn in a racially neutral manner, as petitioners contend, it is still unconstitutional under the controlling decisions of this Court if it perpetuates a prior intentional and purposeful denial to blacks of equal access to the political process.

But in addition to finding the plan unconstitutional, the Fifth Circuit also found that the District Court's approval of this plan as a court-ordered plan constituted an abuse of discretion (Pet. App. C, pp. A79-A80). As the previous discussion points out, *Connor*, *East Carroll Parish*, and *Chapman* all make clear that a court-ordered plan must be held to higher standards than a legislative plan. Thus, even if the court-ordered plan is not unconstitutional according to the standards governing the constitutionality of legislative plans, the plan is still invalid under the standards applicable to court-ordered plans for the reasons stated by the Court of Appeals.

Petitioners have failed to show that this case satisfies any of the considerations established by this Court calling for review on writ of certiorari. For the above-stated reasons, this case fails to present any new, special, or important issues which have not already been resolved by this Court. The decision of the Court of Appeals is not in conflict with any decisions of this Court nor does it depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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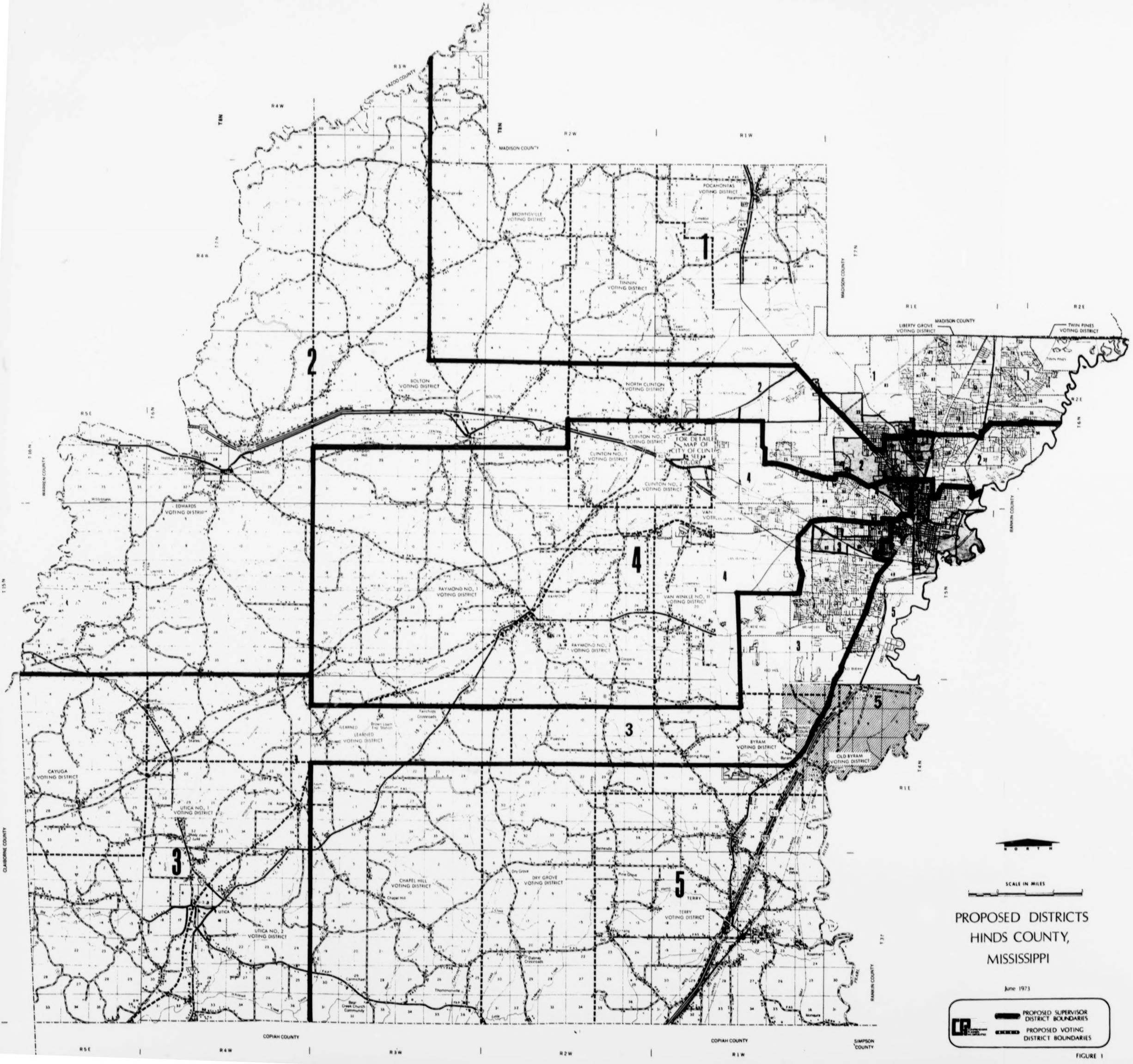

PROPOSED DISTRICTS HINDS COUNTY, MISSISSIPPI

June 1973

PROPOSED SUPERVISOR DISTRICT BOUNDARIES

PROPOSED VOTING DISTRICT BOUNDARIES

FIGURE 1